No. 90-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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February 8, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The Clean Water Act provides that all publicly and privately owned facilities intending to discharge any effluent into the nation's waters must obtain a discharge permit from the U.S. Environmental Protection Agency or from a designated agency in the source state. To obtain a permit under this National Pollutant Discharge Elimination System (NPDES), the facility (or point source) must demonstrate that the discharge will both meet the technology-based effluent limitations set by EPA and comply with the approved water quality standards of the source state.

At issue in this petition is whether the court of appeals erred by holding that the Clean Water Act imposes two further conditions on the issuance of NPDES permits. The specific questions raised by the court's decision and this petition are:

(1) Whether a facility must also comply with the water quality standards of all downstream states, regardless of their terms and severity, and furthermore, whether EPA lacks any discretion in applying those downstream standards; and

(2) Whether a pre-existing violation of water quality standards on any downstream segment, in either the source state or any downstream state, automatically precludes the issuance of new permits.

PARTIES TO THE PROCEEDINGS

The State of Arkansas, the Arkansas Department of Pollution Control & Ecology (A.D.P.C. & E.), the City of Fayetteville, Arkansas and the Beaver Water District, petitioners in this Court, were all cross-petitioners in the court of appeals.

The State of Oklahoma, the Oklahoma Scenic Rivers Commission, the Oklahoma Pollution Control Coordinating Board, and Save The Illinois River (STIR) were petitioners in the court of appeals, and the Oklahoma Wildlife Federation was an intervenor on the side of Oklahoma. These Oklahoma parties are all respondents in this Court.

The U.S. Environmental Protection Agency (EPA) was the respondent in the court of appeals and is filing a separate petition for certiorari in this Court.

All of the Arkansas parties joining this petition are governmental and public entities and have no subsidiaries, affiliates, or parent corporations. *See* Supreme Court Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Arkansas, the Arkansas Department of Pollution Control & Ecology, the City of Fayetteville, Arkansas and the Beaver Water District, respectfully request that a writ of certiorari issue to review the judgment in this case of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 908 F.2d 595 and is reprinted at App. A in the Appendix to this Petition. The Initial Decision by the Administrative Law Judge (ALJ) for the Environmental Protection Agency (EPA), the Order on Petitions for Review by EPA's Chief Judicial Officer (CJO), the ALJ's Decision on Remand, and the CJO's Second Order on Petitions for Review are reprinted as App. F, App. G, App. H, and App. I, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1990. App. E. Timely petitions for rehearing and rehearing *en banc*, filed by the Arkansas parties and EPA, were denied by the court of appeals on October 11, 1990. App. B. The court of appeals nevertheless granted a stay of mandate on October 31, 1990 pending the timely filing of a petition for certiorari. App. C. On December 28, 1990, Justice White extended the time for filing this petition to and including February 8, 1991. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTE INVOLVED

The statute involved is the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387.[1] The relevant portions of Sections 301, 303, 401, 402 and 510 of the CWA are set forth in App. J.

STATEMENT OF THE CASE

This petition presents two issues of fundamental importance to the allocation of regulatory authority and the implementation of water quality standards under the Clean Water Act. The first issue involves the authority of downstream states to compel facilities in upstream states to comply with downstream standards as a condition of obtaining new discharge permits. Under the Tenth Circuit's decision, downstream states have virtually unfettered discretion to set more stringent standards and give them extra-territorial effect, even to the point of blocking the issuance of new permits in upstream states.

The second issue presented involves the impact of preexisting violations on the ability of EPA and the states

[1] For the Court's convenience, citations throughout are to the sections of the CWA. Parallel citations to the U.S. Code are provided in the Table of Authorities and in App. J.

to grant new permits under the Clean Water Act. According to the Tenth Circuit, a violation of water quality standards on one segment of a waterway triggers a permit ban for all upstream segments and tributaries, both in the state of the violation and in any upstream state. Both of these issues have extraordinary implications for upstream states, for the resolution of interstate disputes over water quality, and for the ability to grant new discharge permits throughout much of the nation.

Statutory Background. Any publicly or privately owned facility that discharges into the nation's waterways must obtain a permit under the CWA's National Pollution Discharge Elimination System (NPDES). One condition for receiving an NPDES permit is that a new point source must comply with the technology-based effluent limitations established by EPA. CWA § 301(b). In addition, a point source must comply with such other limitations as are necessary to ensure compliance with "applicable" water quality standards. CWA § 301(b)(1)(C).

Although EPA establishes certain minimum federal criteria, the states are primarily responsible for promulgating the water quality standards within their own jurisdiction. These standards typically set maximum limits on the level of various pollutants in the receiving waters, and while subject to EPA approval, can vary markedly and sometimes far exceed the federal criteria. CWA §§ 304(a), 510. The responsibility for issuing NPDES permits can also be delegated to states with approved permitting programs. Otherwise, EPA acts as the permitting agency in states that do not have approved programs. CWA § 402(b).

Factual Background. The City of Fayetteville is located in the northwest corner of Arkansas, approximately thirty miles from the Oklahoma border. Like virtually all other cities, Fayetteville operates a wastewater treatment facility that collects, treats, and eventually must discharge the water used by local residents and busi-

nesses. In the early 1980's, Fayetteville decided to replace its aging treatment plant, which had caused numerous violations of Arkansas water quality standards and recurring fish kills, by constructing a new state-of-the-art treatment facility at the cost of $40,000,000.[2] After extensive studies and hearings, the Arkansas authorities concluded that a split-flow discharge of the new facility's treated effluent, between the White River and a creek that ultimately flows into the Illinois River, would best minimize any environmental impact of the new facility.[3]

The Agency Proceedings. In due course, Fayetteville applied to EPA for an NPDES discharge permit under CWA § 402 to operate this new plant and authorize the split-flow discharge.[4] EPA then determined that the Fayetteville discharge would comply with all federally-approved Arkansas water quality standards on both the White and Illinois Rivers. Furthermore, the Agency

[2] The new Fayetteville wastewater treatment plant incorporates advanced wastewater treatment utilizing biological phosphorous removal and nitrification, rapid sand filtration, post-aeration, dechlorination, and effluent storage, in addition to conventional types of treatment. There are very few wastewater treatment plants in the United States that have this level of sophistication for treating effluent to remove nutrients and other pollutants.

[3] The Arkansas authorities found that a 100% discharge into the White River would violate Arkansas' water quality standard for dissolved oxygen. In contrast, the split-flow alternative would permit compliance with the standards on both rivers, and would minimize the environmental impact by utilizing the natural assimilative capacity of both river basins to remove the very low concentration of nutrients and other materials that remain in the treated effluent. In addition, since 55% of the population that contributes waste to the new facility lives in the Illinois River Basin and the remaining 45% lives in the White River Basin, the split-flow approach has the virtue of returning effluent to the same basin that generates it.

[4] EPA had not delegated permitting authority to Arkansas when the application was filed in June 1985. Although Arkansas has since received this authority, that fact does not affect EPA's issuance of the permit in this case or the continuing importance of the issues presented here.

found that the discharge from the Fayetteville facility would have no adverse impact on the receiving waters. Oklahoma and Arkansas, however, have had a number of disputes regarding the rivers that flow between those states, and Oklahoma promptly objected to EPA's decision based on the partial discharge into tributaries of the Illinois River, which flows into Oklahoma about forty miles downstream from Fayetteville.[5]

Following a three-day evidentiary hearing in August 1987, the ALJ upheld the permit based on a finding that the Fayetteville discharge would have no "undue impact" on Oklahoma water quality. App. 105a. The ALJ's decision was upheld in part and vacated in part by EPA's CJO on June 28, 1988, who determined that the proper legal standard for interstate water disputes was whether the Fayetteville discharge would "cause an actual *detectable* violation of Oklahoma's water quality standards." App. 117a (emphasis in original). Applying this standard on remand, the ALJ found that the Fayetteville discharge would have no detectable impact on Oklahoma water quality, and therefore again approved the permit. App. 122a. The ALJ's decision to approve the permit was upheld by the CJO on December 22, 1988, App. 145a, and the Fayetteville facility began discharging under its approved permit in January 1989.

The Court Of Appeals' Decision. The Oklahoma parties then sought judicial review, and in the decision below, the Tenth Circuit reversed EPA's approval of the split-flow discharge. This decision rests on two key holdings. First, the court held that a facility could not receive an NPDES permit for a discharge into an interstate waterway or its tributary unless it complied with *all* the fed-

[5] Specifically, the challenged half of the facility's effluent is discharged into an unnamed tributary of Mud Creek, which flows two miles to the tributary's confluence with Mud Creek, which flows three miles to Clear Creek, which flows thirteen miles to the Illinois River, which then flows approximately twenty-two additional miles to the Oklahoma border.

erally-approved water quality standards of *all* downstream states. App. 43a. To this extent, the court agreed with EPA's decision and rejected Arkansas' contention that the Oklahoma standards were inapplicable. However, the court went on to reject EPA's approach for applying the downstream Oklahoma standards and also specifically rejected EPA's exception for discharges having a "non-detectable" impact. App. 45a-53a. Under the court's approach, EPA is left no discretion to apply, interpret or determine compliance with the standards of a downstream state. This construction of the CWA, in effect, gives downstream states an absolute veto over permit decisions in the source state.

The Court made its second key holding in the course of deciding against remanding the case to EPA. In particular, based on its interpretation of the statutory scheme, the court held that any pre-existing downstream violation of a relevant water quality standard should preclude granting new permits on upstream segments of that waterway or its tributaries.[6] App. 79a-80a. This ban on new permits even applies to new discharges that would have no detectable impact on downstream water quality and would not contribute in any way to the downstream violation. So long as *some* amount of the effluent would reach the downstream segment experiencing water quality violations, the discharge is banned.[7]

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[6] A "relevant" water quality standard refers to a standard that applies to the types of pollutants discharged by a particular source. Thus, the Tenth Circuit's decision imposes a ban on any new discharge of pollutants that are of the type responsible for a pre-existing violation of a downstream water quality standard.

[7] Although the court did limit this ban to dischargers whose effluent "would reach" the downstream segment experiencing a water quality violation, App. 67a, the practical significance of this limitation is unclear. EPA previously had found that the Fayetteville discharge would have no detectable effect on Oklahoma water quality, App. 78a, and even though the court did not disturb that finding, it still concluded that enough effluent from the Fayetteville facility "reached" Oklahoma waters for the ban to apply.

In applying this new rule, the Tenth Circuit did not disturb EPA's finding that the Fayetteville discharge would have no detectable effect on Oklahoma water quality. App. 78a. Under the court's view, that finding was simply irrelevant. Instead, the court undertook its own review of the record and found that pre-existing violations of Oklahoma's non-degradation standard were occurring on segments of the Illinois River in Oklahoma, and that some amount of the Fayetteville discharge, even if undetectable, would reach Oklahoma. App. 67a. Based upon these factual "findings" and the two legal holdings described above, the court concluded that no remand to the Agency was required and that EPA was compelled to deny the permit for the split-flow discharge into the Illinois River tributaries. App. 83a.

REASONS FOR GRANTING THE WRIT

The two legal issues raised by the Tenth Circuit's decision are critical to the administration of the Clean Water Act and to the resolution of interstate disputes over water quality regulation. The NPDES program now governs the permitting for virtually all public and private facilities that discharge into the nation's waterways. The ability of countless facilities to obtain those permits, and the enormous investment required of public authorities and private industry to build those plants and comply with NPDES permits, frequently depend on the delineation of authority between upstream and downstream states. Similarly, the Tenth Circuit's conclusion that either in-state *or* out-of-state violations of water quality standards preclude new discharges—on all upstream segments and tributaries—will dramatically affect the availability of new permits and the completion of pending projects throughout many regions of the country.

Not only are the two issues presented vital for all the states, but the Tenth Circuit's resolution of those issues threatens to undermine twenty years of precedent and radically alter administration of the CWA. In particular,

with respect to the *first* issue of interstate authority, the Tenth Circuit's decision conflicts with a series of this Court's decisions holding and assuming that a state can only regulate sources within its own borders. At least two other circuits and one state supreme court have also reached conclusions that are directly opposite to the Tenth Circuit's holding. In addition, the Tenth Circuit's decision would disrupt the careful balance of upstream and downstream state interests established elsewhere in the CWA, by giving downstream states an unlimited right to impose their standards on sources in upstream states. *See* Section I *infra*.

Second, the Tenth Circuit's imposition of a permit ban on upstream discharges similarly represents a major departure from the current administration of the NPDES program and the criteria governing the issuance of permits. As shown below, the court created this major new regulatory requirement essentially out of thin air, based solely on the court's view that the ban was necessary to fulfill the CWA's purposes. In fact, this compulsory and immediate ban on new permits conflicts with the statutory framework and will disrupt the permitting programs of EPA and the states. It will also result in a shutdown of new economic growth and industrial development in many regions of the country. The Tenth Circuit's unilateral imposition of such a radical new requirement infringes on the policymaking responsibility of EPA and conflicts with the limited role of a reviewing court recognized in *Chevron* v. *NRDC*, 467 U.S. 837 (1984). *See* Section II *infra*.

As shown below, the Tenth Circuit's decision on both issues presented will create tremendous uncertainty in ongoing and future permit proceedings. Its first holding will inevitably provoke and exacerbate a number of state-versus-state disputes and downstream state challenges in permit proceedings. Its second holding, at a minimum, will enormously complicate permit proceedings and inundate permitting agencies with data requirements and hearing requests. Together, these rulings will create unprecedented confusion for permitting agencies and applicants and disrupt ongoing efforts to improve water quality. *See* Section III *infra*.

I. THE ISSUE OF WHETHER DOWNSTREAM STATE STANDARDS APPLY IN PERMIT DECISIONS FOR SOURCES IN UPSTREAM STATES SHOULD BE RESOLVED BY THIS COURT.

Disputes among the states over the authority to regulate water quality on interstate waterways have provoked extensive litigation during the past two decades. The vast majority of the nation's rivers and streams either cross state borders or feed interstate waterways, and recurring disputes over these waters have required review by this Court on numerous occasions. *See, e.g., Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*); *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987).[8] The importance of the issues, the implications for state sovereignty, and the state-versus-state character of these disputes all create a compelling need for resolution of these cases by this Court and for clear guidance to the states and EPA.

The instant case similarly requires plenary review, not just to resolve a longstanding dispute between Arkansas and Oklahoma, but to settle a fundamental question for all states about the applicability of downstream state standards in CWA permit proceedings. Moreover, as demonstrated below, the Tenth Circuit's decision on this issue conflicts with the decisions of this Court, threatens

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[8] *See also Oklahoma* v. *Arkansas*, 460 U.S. 1020 (1983) (denying motion for leave to file a bill of complaint); *Scott* v. *City of Hammond, cert. denied*, 469 U.S. 1196 (1985); *Tennessee* v. *Champion Int'l Corp., cert. granted, judgment vacated and remanded*, 479 U.S. 1061 (1987); *Arkansas* v. *Oklahoma*, 488 U.S. 1000 (1989) (denying motion for leave to file a bill of complaint).

to disrupt the balance of state interests under the Clean Water Act, and creates a substantial conflict with the decisions of other circuits and state courts.

A. The Tenth Circuit's Holding Conflicts With The Decisions Of This Court Holding That One State Cannot Regulate Sources In An Adjoining State.

The issue of whether downstream states have authority to regulate sources in upstream states has come before the Supreme Court in at least three contexts during the past decade. In each of these contexts, this Court has decided that downstream states do not have such rights. The Tenth Circuit's holding that allows a downstream state to control the permitting for out-of-state sources conflicts with the holdings and premise of this Court's decisions in all three contexts.[9]

In the first of these contexts, this Court held that the enactment of the CWA foreclosed downstream states from bringing federal common law actions to "regulate" discharges in upstream states. *Milwaukee II*, 451 U.S. 304 (1981). This holding rested fundamentally on the conclusion that while Section 510 of the CWA did indeed allow a state to adopt more stringent water quality standards for its own waters than the federal criteria, the CWA did *not* allow a state to apply such standards against an out-of-state source. Thus, "[s]tates may adopt more stringent limitations through state administrative processes, or even . . . may establish such limi-

[9] The fundamental premise underlying all of this Court's decisions on interstate water quality disputes is that considerations of interstate equality and sovereignty prevent one state from imposing its standards on another state:

> [No] state can legislate for, or impose its own policy upon the other . . . . One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.

Kansas v. *Colorado*, 206 U.S. 46, 95-98 (1907).

tations through state nuisance law, and apply them to *in-state* discharges." *Id.* at 328 (emphasis added). Nevertheless, the Court recognized a sharp distinction between the regulation of in-state and out-of-state sources, for "[i]t is quite another [thing] to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to *out-of-state* dischargers." *Id.* (emphasis added).

In the second context, this Court held that the CWA preempts downstream states from bringing actions under their own common law to "regulate" sources in an upstream state. *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987). The distinction between in-state and out-of-state sources was again the key premise of the holding. Based on this important distinction, the Court held that the CWA does not preempt a state from applying its own common law to in-state sources, but *does* preempt application of that law to out-of-state sources. As a result of this delineation in regulatory authority, "when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located." *Id.* at 487.

The third context where this Court has addressed the issue of downstream state authority also arose in *Ouellette* and parallels the precise issue decided by the Tenth Circuit. Specifically, as the predicate for its preemption holding, this Court carefully interpreted the CWA provisions relating to interstate water quality disputes and concluded that under the Clean Water Act, a downstream state "only has an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490. While an "affected" downstream state must be notified of a pending permit and afforded an opportunity to object, the downstream state *cannot* block issuance of the permit in th[illegible]eam state:

> [A]n affected State does *not* have the authority to block the issuance of the permit if it is dissatisfied

> with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the *discretion* to disapprove the permit if he concludes that the discharges will have an *undue impact* on interstate waters. . . . Thus the Act makes it clear that affected States occupy a *subordinate* position to source States in the federal regulatory program.

Id. at 490-91 (emphasis added).

The Court's interpretation of the CWA as not allowing a downstream state to impose its stricter water quality standards on an out-of-state discharge was the *sine qua non* of the Court's holding that the CWA preempted the common law of a downstream state but not of the source state. In particular, the Court held that the extraterritorial application of the downstream state's common law would conflict with the CWA's prohibition against applying downstream water quality standards to regulate an out-of-state discharge. As this Court put it, the application of the common law of a downstream state is preempted because it would allow downstream states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Id.* at 495.[10]

The Tenth Circuit's decision squarely contradicts the allocation of authority recognized in all of these decisions. Under *Ouellette*, EPA can elect to impose stricter limitations on an upstream source to protect the water quality of a downstream state, but the downstream state has no right to force EPA or the source state to adopt

[10] The Tenth Circuit characterized this discussion of the Clean Water Act as *dicta*, which it declined to follow. App. 26a. In fact, this construction of the CWA was a necessary element of the Court's holding that the CWA preempted application of Vermont nuisance law against a discharge located in New York. Since the Court found that the CWA had neither expressly preempted state law nor completely occupied the field, the Court was actually *required* to interpret the CWA provisions allocating interstate authority, in order to determine whether the state law action conflicted with the Congress' specific allocation of responsibility among upstream and downstream states. *See* 479 U.S. at 492.

stricter limitations. In the present case, EPA concluded that the Fayetteville discharge would have no adverse impact on Oklahoma water quality, and that no additional limitations on the Fayetteville discharge were necessary to protect Oklahoma water quality.

Instead of deferring to EPA's delegated discretion to balance the interests of upstream and downstream states, the Tenth Circuit adopted a fundamentally different approach which requires an out-of-state facility to strictly comply with the water quality standards of a downstream state. Moreover, the court's decision strips EPA of any discretion to apply or interpret the downstream standards, to disregard standards that are blatantly discriminatory, or otherwise unreasonable, *see* note 14 *infra*, or to assess compliance with the downstream standards. In effect, the Tenth Circuit's decision gives downstream states unlimited power to regulate sources in an upstream state, even when the out-of-state discharge would have no detectable impact on downstream water quality. This conflict with the decisions in *Milwaukee II* and *Ouellette*, and with well-established principles of interstate equality and sovereignty, will severely affect all downstream states and plainly requires review by this Court.

B. The Decision Below Conflicts With Congress' Balance Of Upstream And Downstream Rights And Will Disrupt Administration Of The Clean Water Act.

Another reason the Tenth Circuit's decision warrants review is that it conflicts with the CWA and disrupts the careful balance of state interests established by that Act. As this Court explained in *Ouellette*, the CWA "carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA." 479 U.S. at 497. By giving downstream states unlimited power to impose their regulatory standards on out-of-state sources, the Tenth Circuit's decision destroys this delicate balance between the interests of upstream and downstream states.

The most obvious conflict with the statutory scheme relates to Section 510 of the Act. This provision allows states to adopt water quality standards that are significantly stricter than the minimum federal criteria. The Tenth Circuit seemed to believe this authority was tempered by the need to obtain EPA approval for such standards. App. 14a n.5. In fact, however, both EPA and reviewing courts have long concluded that EPA lacks the authority to disapprove the adoption of more stringent standards by a state, even though EPA may consider them unnecessary, unreasonable, or otherwise inappropriate. Rather, EPA can only review these state standards to ensure that they at least meet the minimum federal criteria. *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979); *see also* 54 Fed. Reg. 39,099 (1989); *Mississippi Commission on Natural Resources* v. *Costle*, 625 F.2d 1269, 1273 (5th Cir. 1980). This recognition of blanket authority makes sense when a state is setting more stringent standards solely for in-state sources, as this Court allowed in *Milwaukee II*. But it will create the regulatory equivalent of gridlock if downstream states can set such standards and compel compliance by sources in all upstream states. Yet that is precisely the consequence of the Tenth Circuit's decision, and EPA will be left with no power to clear the impasse.

In addition, the Tenth Circuit's approach conflicts with the statute's carefully balanced consultative process for considering downstream state water quality standards when making permit decisions. These statutory provisions clearly provide only an advisory role for downstream states and give EPA the discretion to make reasonable accommodations between the interests of upstream and downstream states. For example, when a state acts as the permitting authority—which is the situation now for most states[11]—Section 402(b)(5) requires the permitting state to notify a potentially affected

[11] As of March 1990, thirty-eight states and the Virgin Islands had been delegated permitting authority under the CWA. [1 State Water Laws] Env't Rep. (BNA) 611:0111.

state of a permit application, and to provide the downstream state an opportunity to submit written recommendations. Nevertheless, the statutory procedure does *not* require the permitting state to accept the downstream state's recommendations; its only obligation under the Act is to notify the downstream state and EPA in writing if it decides not to accept the downstream state's recommendations.

However, if the permitting state does reject the recommendations of a downstream state, EPA may then decide to veto the permit under Section 402(d)(2)(A). EPA's authority to veto the permit is also discretionary, and a decision not to veto a permit is unreviewable in federal courts. *See, e.g., District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980).[12] Together, these consultative provisions encourage negotiated solutions and give both the permitting state and EPA the authority to impose additional discharge limitations that will protect the water quality of a downstream state. But the Act clearly does not require such additional limitations, and the statutory procedure obviously withholds from downstream states the power to insist that their standards be imposed on an out-of-state source.

The statute provides a similar advisory mechanism when EPA is the permitting authority for a discharge that may have interstate effects. Under Section 401(a)(2), EPA must first make an initial threshold finding whether the discharge will adversely affect the water quality of a downstream state. If EPA does make such a finding, the downstream state may then notify the permitting agency in writing of its objections to the proposed permit, and may request a public hearing. Based on the evidence presented at the hearing, EPA must then determine whether any additional limitations on the pro-

[12] EPA has "almost unfettered discretion" to decline to veto a state-issued permit even if the permit violates applicable guidelines or standards established under the Act. *Mianus River Preservation Comm.* v. *EPA*, 541 F.2d 899, 907-09 (2d Cir. 1976); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977).

posed discharge are necessary to protect the water quality of the downstream state.

This carefully constructed consultative process would be rendered meaningless by the Tenth Circuit's decision, which automatically requires out-of-state sources to rigidly comply with a downstream state's water quality standards.[13] The court's decision thus leaves no room for the balancing of state interests, and it leaves no apparent limits on the power of a downstream state to adopt unreasonably strict water quality standards and impose them unfairly on out-of-state sources.[14] As a result, the

[13] As the United States explained in its brief as amicus curiae opposing certiorari in *Scott* v. *City of Hammond*, allowing a downstream state to regulate an out-of-state source would disrupt the delicate balance established by the Clean Water Act:

> The CWA creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements, subject to state decisions to "adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to *in-state* dischargers." Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent pollution limitations within their borders. If . . . one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed. Where several states are situated on a particular body of water the state that has the most stringent limitations will displace the federal government as the arbiter of minimum pollution control requirements; this result is clearly contrary to the "full purposes and objectives of Congress."

Brief for the United States as Amicus Curiae at 10, *Scott* v. *City of Hammond, cert. denied*, 469 U.S. 1196 (1985) (No. 84-21) (emphasis in original) (citations omitted).

[14] By imposing very strict water quality standards on only the first few miles of an interstate waterway after it enters the state, a downstream state can impose stringent requirements on sources in an upstream state without imposing similar restrictions on in-state sources. This is precisely what has happened here. Oklahoma declared the segment of the Illinois River immediately inside its border an outstanding National resource and adopted extremely strict water quality standards for this segment of the river only. Since Arkansas sources are upstream from this segment, they must comply with these harsh standards under the Tenth Circuit's decision. At the same time, Oklahoma has adopted far less stringent standards further downstream, where most Oklahoma sources discharge effluent into the Illinois River.

Tenth Circuit's one-sided construction not only creates a fundamental conflict with the balance struck by Congress, but it also undermines any basis for interstate cooperation and threatens to seriously disrupt administration of the Act.

C. The Court Of Appeals' Decision Also Conflicts With The Decisions Of Courts In Other Circuits And States.

Finally, the Tenth Circuit's holding on the extra-territorial application of state water quality standards should be reviewed because it conflicts with the decisions of courts in other circuits and states. Indeed, until now every other final decision addressing the issue has concluded that a downstream state cannot impose its standards on an out-of-state source.

In *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom., Scott* v. *City of Hammond*, 469 U.S. 1196 (1985), the Seventh Circuit held that applying either the regulatory standards or common law of a downstream state against an out-of-state facility would "lead to chaotic confrontation between sovereign states" and would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water." *Id.* at 414. In construing Section 510 of the CWA, which permits a state to adopt water quality standards that are stricter than the minimum federal criteria, the Seventh Circuit stated:

> In the light of the structure of [the CWA], with its emphasis upon the role of the state where the discharge in question occurs, except for provisions ex-

> pressly protecting the interests of other states, and in the light of the conflict and confusion which could result from any different construction, we conclude that this provision refers to the right of a state with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state.

Id. at 413. This interpretation of the CWA was also supported by the United States in its amicus brief successfully urging this Court not to review the Seventh Circuit's decision.[15]

Similarly, in a case decided shortly after the Tenth Circuit's decision, and which involved another new Arkansas facility that allegedly had the potential to violate Oklahoma water quality standards, the D.C. Circuit followed this Court's construction of the CWA in *Ouellette* and held that only Arkansas' (and not Oklahoma's) water quality standards were applicable to the Arkansas facility. *National Wildlife Federation* v. *Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990). The D.C. Circuit noted with approval that "[o]ther states, even if they are affected by a discharge, have only an advisory role in regulating the discharge, and they do not have the authority to block the issuance of permits if they are dissatisfied with the proposed standards." *Id.* at 1483.

The Tennessee Supreme Court has also recently held that under the CWA provisions at issue here, Tennessee could not require a discharger located in North Carolina to comply with Tennessee water quality standards. *State* v. *Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986). The court concluded that "[e]ach state . . . clearly operates within the sphere of its own jurisdiction, and may

[15] *See supra* note 13. Arkansas recognizes that the federal government has not always taken a consistent position regarding the applicability of downstream state standards in permitting decisions. Nevertheless, this fact itself emphasizes the compelling need for this Court to definitively resolve this issue under the Clean Water Act.

not . . . control points of discharge lying within the jurisdiction of other states." *Id.* at 574.[16]

In sum, this Court should grant certiorari because the Tenth Circuit's decision regarding the extra-territorial application of downstream standards creates a conflict with the decisions of this Court, other circuits, and state courts, and will disrupt the balance of interests struck by Congress in the Clean Water Act.

II. THE TENTH CIRCUIT'S IMPOSITION OF A PERMIT BAN IN ALL AREAS UPSTREAM FROM EXISTING VIOLATIONS ALSO REQUIRES SUPREME COURT REVIEW.

The second issue presented also has nationwide implications and is critical to the administration of the Clean Water Act. As described above, the Tenth Circuit held that the existence of a water quality violation on one downstream segment of a waterway precludes the issuance of a new NPDES permit on any upstream segment or tributary of that waterway. App. 79a-80a. Thus, the court's finding of prior and unrelated violations on sections of the Illinois River *in Oklahoma* triggered an ex-

[16] This decision was subsequently vacated, apparently on a separate ground, and remanded to the Tennessee Supreme Court for further consideration in light of *Ouellette*. 479 U.S. 1061 (1987). While *Ouellette* and the Tennessee Supreme Court's decision were in agreement that the law of a downstream state could not be applied against an out-of-state discharger, the two decisions were in conflict over whether the courts of a downstream state could exercise jurisdiction over an out-of-state facility to apply the law of the source state.

The same Tennessee-North Carolina dispute was also brought to federal court, where a district court held that a downstream state's water quality standards should not be a decisive factor in the permitting decision for a facility proposing to discharge into an interstate waterway, although they were a "relevant factor" that the EPA Administrator could consider. *Champion International Corp.* v. *EPA*, 652 F. Supp. 1398, 1400 (W.D.N.C. 1987). On appeal, the Fourth Circuit emphasized that it agreed with much of the district court's decision, but it ultimately vacated the district court's decision for lack of subject matter jurisdiction. 850 F.2d 182 (4th Cir. 1988).

traordinary ban on granting new permits *in Arkansas* for discharges that contain the same pollutant.

The drastic repercussions and extreme nature of this new rule are demonstrated by the court's decision not even to remand this proceeding to EPA. So long as *any* amount of effluent would reach the areas of violation in Oklahoma, EPA was required to deny the permit. EPA's prior findings that the Fayetteville discharge would have no detectable effect on downstream water quality and would not contribute to any Oklahoma violations were legally irrelevant, as was the actual cause of the violation in Oklahoma. As shown below, this draconian construction of the Act radically alters the statutory scheme, threatens to initiate a permit ban throughout much of the nation, and manifestly warrants plenary review by this Court.

A. A Ban On New Permits Upstream From Any Violation Of Relevant Water Quality Standards Is A Radical Departure From The Statutory Scheme.

The Tenth Circuit's holding represents a radical departure from the framework and language of the CWA. Congress never intended nor envisioned that an existing water quality violation would preclude new discharges. At the time the 1972 Amendments were enacted, many of the nation's waterways were severely polluted,[17] yet Congress never suggested that this would require a ban on new permits for affected waterways. Rather, Congress adopted a fundamentally different approach to gradually achieve acceptable water quality on polluted waterways by imposing effluent limitations on point sources that were to become progressively more stringent with time.[18] Although more stringent effluent limitations

[17] *See* S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News. 3668, 3674.

[18] As originally enacted, the 1972 Amendments required point sources other than publicly owned treatment works to achieve the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. Pub. L. No. 92-500, § 2, 86 Stat. 816, 844-45 (1972). The timetable for achieving the latter standard was subsequently relaxed to March 31, 1989. *See* CWA § 301(b).

are required for new sources under Section 306, there is no discussion in the CWA or its legislative history of a ban on new permits when there is an existing violation of water quality standards.

The Tenth Circuit itself admitted it could find no "explicit imprimatur" in the CWA for holding that the Act requires a ban on new permits upstream from a violation of a relevant water quality standard. App. 81a. In fact, the court's holding is directly inconsistent with Section 303(d) of the Act, the only provision in the CWA that addresses existing violations of water quality standards. Section 303(d) requires states with existing violations to establish maximum daily loads designed to bring affected water segments into compliance.[19] However, Section 303(d) does not require states to immediately establish maximum daily loads for all waterways with existing violations. Instead, a state may establish maximum daily loads according to the state's own priority ranking of its waterways, with no fixed deadline for completing the process for all waterways. CWA § 303(d)(1)(A). Moreover, even if a maximum daily load has been established for a waterway, new discharges or increased discharges from existing sources would be allowed provided they are included in the maximum daily load allocation. Thus, Section 303(d) gives source states a flexible and gradual mechanism for establishing priorities and, when the time is appropriate, allocating equitably the burden of reducing discharges. The Tenth Circuit's immediate and absolute ban is fundamentally inconsistent with this statutory scheme.

[19] A maximum daily load is the total quantity of effluent that can be discharged into a waterway per day without exceeding the relevant water quality standards.

B. The Tenth Circuit's Holding Requiring A Ban On New Permits Will Have Enormous, Detrimental Consequences Across The Nation.

The Tenth Circuit's imposition of a construction ban upstream from an existing violation of a relevant water quality standard will severely disrupt economic development in many states, the construction plans for many new and proposed facilities, and the NPDES permitting programs of EPA and state agencies. A significant proportion of the nation's waterways have existing violations of water quality standards. According to EPA's most recent *National Water Quality Inventory*, thirty percent of the river and stream miles that have been assessed nationwide were found to be not fully in compliance with applicable water quality standards.[20] Because the Tenth Circuit's decision would effectively block any new discharge that is upstream from a segment with such a water quality violation, the decision has the potential to block all new permits on a large majority of the nation's waterways. Consequently, the Tenth Circuit's decision may essentially impose a freeze on new industrial development and economic growth in many regions of the country.

The Tenth Circuit's holding is also inconsistent with EPA's current administration of the CWA, and will cause serious disruption of the permitting program of EPA and the states. In considering the permit application of a point source discharge under the CWA, EPA and state permitting agencies usually do not make an assessment of other discharges into the waterway or of the downstream water quality. Rather, a permitting agency looks at each source individually to determine if that discharge will cause a water quality violation at the point of discharge.[21]

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[20] EPA, *National Water Quantity Inventory, 1988 Report to Congress* (EPA 440-4-90-003, Apr. 1990), at 1-3.

[21] *See* U.S. General Accounting Office, *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters* (GAO/RCED-89-38, Jan. 1989). Technically, a point source's compliance with water quality standards is usually measured at the edge of a designated area called a "mixing zone" that allows some dilution of the effluent. *See* EPA, *Water Quality Standards Handbook* (Dec. 1983).

Under the new rule announced by the Tenth Circuit, a permitting agency will be required to assess water quality on all downstream segments to determine if there are existing violations of relevant water quality standards. This requirement will present enormous practical problems for permitting agencies, especially since the water quality of only twenty-nine percent of the nation's stream miles has been evaluated.[22] Thus, the Tenth Circuit's decision will impose tremendous informational and administrative burdens on permitting agencies, which will be compelled to obtain data on downstream water quality and incorporate this information into the decision-making process for permit applications. The complexity and delays involved in permit decisions will be increased dramatically.

C. The Tenth Circuit's Ambitious Construction Conflicts With The Appropriate Role For A Reviewing Court Under The *Chevron* Decision.

The Tenth Circuit exceeded the proper role of a court by unilaterally extending the statutory scheme to impose a ban on new permits upstream from a water quality violation. This type of fundamental policy determination, which will have enormous consequences for the nation, is the appropriate domain of Congress and not the courts.

A ban on new sources upstream from an existing violation of a relevant water quality standard is analogous to the construction ban required in non-attainment areas under the Clean Air Act. 42 U.S.C. § 7410(a)(2)(I) (1988). However, the construction ban required by the Clean Air Act was enacted by Congress, whereas the Tenth Circuit acted without Congressional authorization

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[22] EPA, *supra* note 20, at 1. Furthermore, for the 29% of stream miles that have been evaluated, the reliability of the available data is questionable because of the inconsistent and imprecise methods that have often been used to assess water quality. *Id.* at 3.

or support in imposing a construction ban for non-attainment areas under the CWA. Furthermore, the construction ban imposed by the Tenth Circuit is much more extreme than the ban required by the Clean Air Act. The Tenth Circuit's ban is much broader because it extends beyond the area of non-attainment of ambient standards to also ban any new source upstream from an existing violation. In addition, the Tenth Circuit's ban is much more absolute than the equivalent requirement under the Clean Air Act. That Act permits the construction and operation of a new source in a non-attainment zone if it offsets its new emissions with an equivalent reduction of emissions from other sources in the same area. 42 U.S.C. § 7503 (1988). The Tenth Circuit's decision allows no comparable exception; the ban on new permits is absolute.

The Tenth Circuit's imposition of this ban thus clearly exceeds the appropriate role for a reviewing court under this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the first step of *Chevron*, a reviewing court must look to see whether Congress has directly spoken to the precise question at issue. *Id.* As discussed above, Congress did expressly address the problem of existing violations of water quality standards by enacting Section 303(d). Furthermore, as the Tenth Circuit itself acknowledged, App. 81a, Congress did not enact any express language requiring a ban on new permits when there is an existing water quality violation. The court of appeals, therefore, could find no expression of Congress' intent sufficient under *Chevron* to support imposing its permit ban.

Moreover, even if Congress' intent were not clear, the second step in the *Chevron* standard requires a reviewing court to defer to EPA's interpretation of the statute provided it is reasonable. As the Agency responsible for administering the CWA, EPA has never suggested that an existing violation of water quality standards automatically requires an absolute ban on new permits, especially for discharges that will have no detectable effect on

water quality.[23] Instead of deferring to EPA's long-standing interpretation of the CWA, the court adopted a novel construction of the Act which will dramatically change the substance and administration of the statute in violation of the court's responsibility under *Chevron*.

III. THE TENTH CIRCUIT'S DECISION ON THESE ISSUES THREATENS TO CAUSE WIDESPREAD DISRUPTION AND REQUIRES IMMEDIATE REVIEW.

Every publicly and privately owned facility that wishes to begin discharging into the nation's waters must obtain an NPDES permit. This includes municipal treatment plants, business establishments and manufacturers, and many federal agencies and projects. The facilities themselves and the technology developed to meet CWA requirements represent enormous investments, and the administrative process for obtaining permits often takes years. The Tenth Circuit's resolution of the two issues presented here, especially in combination, creates intolerable uncertainty about the law governing pending and future proceedings and necessitates immediate review by this Court.

A. The Tenth Circuit's Holding On The Applicability Of Downstream State Standards Will Cause Enormous Confusion And Unfairness In NPDES Permitting Decisions.

The Tenth Circuit's holding that EPA must rigidly apply the federally-approved water quality standards of

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[23] In some instances, of course, Section 303(d) of the Act and EPA's implementing regulations can restrict discharges from new sources. 40 C.F.R. § 122.4(i) (1990); *see* page 21 *supra*. These restrictions only apply after a state has established a total maximum daily load for a particular waterway, and even then, only in accordance with the priorities and allocation established by that state. Moreover, these restrictions would only apply to new sources that actually "cause or contribute to" a water quality violation. 40 C.F.R. § 122.4(i) (1990). Oklahoma has not established any such plan for the Illinois River, and this gradual mechanism bears no resemblance to the Tenth Circuit's compulsory and immediate ban.

downstream states when considering the permit applications of upstream facilities has the potential to create tremendous uncertainty for ongoing and future permit proceedings. Most streams and rivers in the lower forty-eight states cross state boundaries or flow into interstate waterways. Therefore, thousands of facilities that discharge into interstate waterways or their tributaries will have to assure compliance with the water quality standards of all downstream states when applying for or renewing their discharge permits.[24]

Under the Tenth Circuit's decision, permit proceedings will become much more complicated and uncertain as permitting agencies and the applicants struggle with the myriad of different state standards that may apply to a single discharge. The "important goals of efficiency and predictability in the permit system" recognized by this Court in *Ouellette*, 479 U.S. at 496, will be undermined by the patchwork of inconsistent state water quality standards that will apply to each permit. Additional evidence may be required concerning the impact on downstream states, and the new rules announced by the Tenth Circuit will require a different outcome in many proceedings.[25]

Under the court's decision, EPA will no longer be allowed the flexibility to carefully balance and accommodate the competing interests of upstream and downstream states and ensure that the burden of controlling pollution is allocated equitably between states. Down-

[24] According to statistics provided by EPA, there are currently over 75,000 outstanding NPDES permits in the nation. Since each permit is only valid for a maximum of five years, over 15,000 new or renewal permit applications must be processed each year.

[25] The Tenth Circuit's holding on the extra-territorial application of state water quality standards is already being applied nationwide. For example, EPA's Chief Judicial Officer recently concluded that the Tenth Circuit's decision required him to deny an evidentiary hearing requested by a North Carolina facility that was being forced to comply with Tennessee water quality standards. *Champion International Corp., Canton Mill*, NPDES Appeal 90-1, at 4-5 (Sept. 5, 1990).

stream states may attempt to use the Tenth Circuit's rigid decision to restrict unfairly the discharges from upstream states.[26] The court's decision will allow downstream states to impose their standards on upstream states, and will also create the potential for downstream states that have polluted their own waterways (or wish to reserve discharge rights for their own residents) to obstruct unfairly or discriminate against industrial activities in upstream states.[27] Furthermore, the uncertainty about the extra-territorial application of water quality standards created by the Tenth Circuit's decision will likely inflame many existing or potential water quality disputes between states and invite regional economic warfare in many areas of the country.

B. The Combined Nationwide Effect Of The Tenth Circuit's Two Holdings Will Be Devastating.

The nationwide impact of the Tenth Circuit's decision will be staggering when the court's first holding on the interstate application of water quality standards is combined with the second holding prohibiting new discharges upstream from a pre-existing violation of a relevant water quality standard. If the Tenth Circuit's decision was applied nationally, for example, a slight violation of Louisiana's water quality standards near the mouth of the Mississippi River would likely require that no new facility that discharges the offending pollutant could be permitted in the entire watershed of the Mississippi

[26] *See supra* note 14.

[27] The provision in the 1987 amendments to the CWA that authorizes EPA to treat an Indian tribe as a state for purposes of setting water quality standards will compound all of these problems. CWA § 518. In applying the Tenth Circuit's holding, a discharging facility will have to comply with the water quality standards of downstream Indian tribes as well as downstream states, creating further potential for confusion and disputes. EPA has already approved state status for at least one Indian tribe, and numerous others will be seeking approval.

River and all its tributaries, an area that comprises a substantial portion of the continental United States.[28]

Furthermore, the Tenth Circuit's decision will immediately create uncertainty about the ability to obtain permits for projects that are now under construction or development. Municipalities and other local authorities need a high level of confidence that new facilities they begin to construct will be permitted, since they cannot afford to waste scarce resources and spend years in administrative proceedings and litigation. Similarly, the uncertainty and risk of a rigid ban on new discharges will disrupt plans for new economic and industrial development, especially in regions of the country vulnerable to downstream objections.

Finally, if the decision of the Tenth Circuit is allowed to stand, opponents of new permits will now have a much greater reason to demand an evidentiary administrative proceeding to challenge almost any new or modified discharge permit. Under EPA's regulations, any interested party can contest a final permit decision by requesting an evidentiary hearing.[29] The request must set forth "material issues of fact relevant to the issuance of the permit" before it can be granted by EPA.[30]

In the past, evidentiary hearings have primarily been requested by permit applicants rather than permit opponents.[31] However, under the Tenth Circuit's decision, opponents of almost every new permit will easily be able to set forth "material issues of fact" to challenge an ap-

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[28] The only criterion for triggering the ban, under the Tenth Circuit's decision, is that some amount of the offending pollutant would have to reach the downstream segment that is experiencing a water quality violation.

[29] 40 C.F.R. § 124.71 (1990). Most states provide for a similar administrative appeal process to challenge state-issued NPDES permits.

[30] 40 C.F.R. § 124.75(a)(1) (1990).

[31] *See* Zemansky & Zerbe, *Adjudicatory Hearings as Part of the NPDES Permit Process*, 9 Ecol. L.Q. 1, 4 (1980).

proved permit on the grounds that there is a downstream violation of a relevant water quality standard. Under the Tenth Circuit's decision, the permit applicant and the permitting agency that issued the permit would have the burden of proof to demonstrate that there are no existing downstream water quality violations.[32] Given the prevalence and uncertainty of water quality violations, it will be very difficult for any permit to be approved under the Tenth Circuit's new rule.

Even if the source and permitting agency do succeed in making the requisite showing at the evidentiary hearing that there are no relevant downstream water quality violations, the delays and burdens imposed on the agency's permitting process by the increased requests for evidentiary hearings will be extensive. Statistics regarding past evidentiary hearings, which primarily dealt with much less complex issues than the existence of water quality violations, indicate that the hearing process frequently delays permitting decisions by three years or more.[33] As this Court has previously recognized, any significant increase in the number of evidentiary hearings "would raise serious questions about the EPA's ability to administer the NPDES program." *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 215 (1980). EPA and states with approved permitting programs will quickly be overwhelmed by a substantially increased number of evidentiary administrative proceedings under the CWA as a result of the Tenth Circuit's decision.[34]

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[32] According to the Tenth Circuit, the "permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants [to] be discharged should be issued and not denied and this burden does not shift." App. 72a n.49 (quoting the ALJ's Initial Decision, App. 102a).

[33] Zemansky & Zerbe, *supra* note 31, at 16.

[34] The Tenth Circuit's decision will also provide fertile grounds for petitions for judicial review of NPDES permits, and is likely to substantially increase the number of such cases that courts must decide. Parties dissatisfied with EPA's final permit decisions can

Only plenary consideration by this Court can avoid these immediate and severe consequences of the Tenth Circuit's decision and provide permitting states, EPA, permit applicants and lower courts the necessary guidance for interpreting the relevant provisions of the CWA.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Tenth Circuit.

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February 8, 1991

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challenge the decisions in a U.S. Circuit Court of Appeals. CWA § 509(b)(1). Interested persons may also be able to file citizen suits to challenge EPA's failure to perform the non-discretionary duty to deny permits when there is an existing violation of a relevant downstream water quality standard. CWA § 505(a)(2).